

[2022] PBRA 52

## Application for Reconsideration by Foster

### Application

1. This is an application by Foster (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 21 March 2022 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the decision letter, the dossier, and the application for reconsideration. I have also listened to the audio recording of the hearing.

### Background

4. The Applicant was convicted on 11 April 2016 for two counts of causing/inciting a female child under 13 to engage in sexual activity (without penetration), one count of causing/inciting a male child under 13 to engage in sexual activity (without penetration) and five counts of breaching a Sexual Offences Prevention Order to which he pleaded guilty.
5. He was sentenced on 11 July 2016, receiving an extended sentence of imprisonment for four years followed by an extended period on licence for four years.
6. He was automatically released on licence on 9 July 2020. His licence was revoked on 29 April 2021, around ten months later, and he was returned to custody the following day. This is his first recall on this sentence and his first parole review since recall.
7. The Applicant was aged 21 at the time of sentencing. He is now 27 years old.

### Request for Reconsideration

8. The application for reconsideration is dated 10 April 2020. It has been drafted by the Applicant and submitted by the legal representative acting on his behalf.
9. It submits that the panel's decision not to direct his release was irrational. It also raises points which could give rise to a finding of procedural unfairness, and I will deal with these as such. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.



## Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State to consider his suitability for re-release.
11. The case proceeded to an oral hearing before three independent members on 15 March 2022. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was legally represented throughout.
12. All professional witnesses agreed the Applicant had core outstanding treatment needs relating to his risk of serious sexual offending towards children. His sexual reoffending predictor score indicates a very high risk of a future contact sexual offence with a high risk of serious harm.
13. All professional witnesses also agreed the Applicant had core outstanding treatment needs relating to substance misuse which is also a risk factor for him.
14. The dossier contained a psychological risk assessment (PRA) dated 10 July 2019. This was completed while the Applicant was at a different establishment. It concluded that the Applicant then had a high dynamic risk of future sexual violence, and this should be treated via a specific 1-1 accredited high-intensity intervention (the accredited intervention).
15. An up-to-date programme needs assessment (PNA) dated 1 March 2022, concluded that the same accredited intervention was needed.
16. The identified intervention was not available at the Applicant's current establishment.
17. The Applicant's COM supported release into the community under the care of the local forensic psychology service (FPS), having secured funding via the Applicant's GP for an assessment. It is reported that the FPS may have been able to offer structured work to address the Applicant's outstanding risks in the community. However, the assessment to determine the Applicant's suitability for this work could only take place if release was directed. Moreover, there were no guarantees that the Applicant would be accepted into the care of the FPS, there was no commencement date identified and any work that would be undertaken was not accredited risk reduction work.
18. The Applicant was seeking release. The panel did not direct the Applicant's release.

## The Relevant Law

19. The panel correctly sets out the test for release in its decision letter dated 23 November 2021.

### *Parole Board Rules 2019*

20. Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper

panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)).

21. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

#### *Procedural unfairness*

22. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

23. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

- (a) express procedures laid down by law were not followed in the making of the relevant decision;
- (b) they were not given a fair hearing;
- (c) they were not properly informed of the case against them;
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

24. The overriding objective is to ensure that the Applicant's case was dealt with justly.

#### *Irrationality*

25. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

*"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

26. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

27. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

#### **The reply on behalf of the Secretary of State**

28. The Secretary of State has submitted no representations in response to this application.

## Discussion

29. It is first submitted that the panel '*set [the Applicant] up to fail*' by not directing the PNA until three weeks prior to the hearing as it was '*guaranteed to highlight a further course*'. This could potentially give rise to procedural unfairness as well as irrationality.
30. First, an updated PNA was not guaranteed to highlight a further course. If the Applicant had made sufficient progress in addressing his risks, it would not have done so. Second, rather than setting the Applicant up to fail, the panel was exploring the extent to which the COM's alternative community-based plan could have been effective. There is nothing procedurally unfair or irrational in the panel's decision to direct a PNA in relatively close proximity to the hearing.
31. It is next submitted that the decision was irrational since it was made on the basis that the Applicant did not complete a programme that was not available at his current establishment.
32. The panel's decision is solely based on risk. The panel reached a rational conclusion that the Applicant had core risk reduction work outstanding that needed to be addressed. The fact that the identified intervention cannot take place at the Applicant's current establishment does not negate those risks.
33. It is next submitted that the Applicant's COM had a community-based alternative that was in place and that their evidence suggested that this was '*far more intense*' and would be more effective than a programme delivered in custody.
34. Even if this is so, it does not automatically follow that the panel must agree. The decision carefully noted and evaluated the limitations of the community-based plan. The panel's decision not to follow the COM was not irrational.
35. It is next submitted that the panel had '*prejudged*' the Applicant from the dossier and this was clear from the panel's attitude towards him in the hearing. This could potentially give rise to procedural unfairness. Having listened to the recording of the hearing, I find no evidence of this. The panel asked the Applicant questions, gave him the opportunity to answer and followed up where appropriate. There was nothing in the panel's questioning to suggest a prejudicial stance toward the Applicant.
36. It is further submitted that the panel was '*oppressive*' and one particular panel member was '*very harsh and kept interrupting witnesses*'. Again, having listened to the recording of the hearing, I find no evidence of any such procedural unfairness, beyond robust questioning (which the panel is perfectly entitled to do) and ensuring witnesses remain focussed on giving evidence which is material to the panel's risk assessment.
37. The Applicant disagrees with the panel's comment that he still has a sexual interest towards children. Having listened to the recording, when asked if he still had a sexual interest in children, the Applicant replied, '*I can't deny it*' and admitted to having sexual thoughts involving children. He said he had no desire to act on them. On this basis, I find the panel's finding to be accurate.

38. Finally, the Applicant submits that the hardship in keeping him detained outweighs any potential risk to the public. The only factor relevant to the panel is public protection and any resulting hardship to the Applicant is immaterial to its decision not to release him.

### **Decision**

39. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was irrational. No matters of procedural unfairness were raised directly, and I find no procedural unfairness arising from any of the comments made in the application. Accordingly, the application for reconsideration is refused.

**Stefan Fafinski**  
**26 April 2022**